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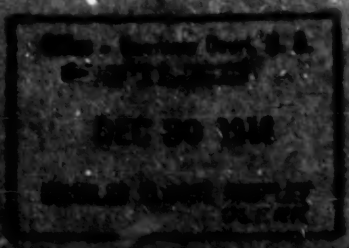

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# In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 72

INTERSTATE COMMERCE COMMISSION, APPELLANT

*v.*

A. L. MECHLING ET AL., APPELLEES

*ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION*

## BRIEF FOR THE INTERSTATE COMMERCE COMMISSION, APPELLANT

## OPINIONS BELOW

The report and order of the Interstate Commerce Commission the validity of which is here involved (R. 10) is reported in 262 I. C. C. 7.[1] The findings of fact and conclusions of law of the District Court (no opinion was filed) are not reported.

[1] The prior reports of the Commission in the same proceeding were before this Court in *Interstate Commerce Commission* v. *Inland Waterways Corporation*, 319 U. S. 671. They are reported in 246 I. C. C. 353 and 248 I. C. C. 307.

## JURISDICTION

The decree of the District Court was entered on November 26, 1945 (R. 207). The petition for appeal was filed and allowed on January 24, 1946 (R. 209). Subsequently, on February 21, 1946, the order allowing the appeal and citation on appeal were amended so as to include the United States as a party appellee (R. 221).[2] Jurisdiction of this Court is invoked under the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 208, 219–221 (U. S. C., Title 28, Secs. 47, 47a), and under section 238 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936 (U. S. C., Title 28, Sec. 345). Probable jurisdiction was noted April 29, 1946 (R. 228).

## STATUTES

The pertinent portions of the Interstate Commerce Act are reproduced in the Appendix hereto.

[2] The original petition for appeal and all the other appeal papers named as appellees the plaintiffs in the three actions in the court below. Although the United States was the statutory defendant in each of them, it obtained a rule to show cause why it should not be served with the appeal papers as a necessary party appellee (R. 220). Following return of this rule the court entered its order requiring true copies of the order allowing appeal, citation on appeal directed to the United States, and all other appeal papers, be served on the United States within five days and amended the order allowing appeal and citation on appeal accordingly (R. 221).

## STATEMENT

The proceeding out of which the present appeal arises has been in controversy since October 1939. The initial phase of it was before this Court in *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U. S. 671. A proper perspective of the present issues requires a short statement of this background.

### A. The Prior Proceedings

By tariffs filed to become effective October 15, 1939, certain eastern line railroads proposed to restrict the application of their proportional rates on grain and grain products, in carloads, from Chicago, Ill., and other related rate-break points, to eastern destinations so that they would not engage traffic arriving by barge over the Illinois Waterways at the rate-break points. Thus ex-barge grain traffic moving by rail to eastern destinations would be subjected to the existing local rail rates. These tariffs were suspended by the Commission pursuant to section 15 (7) of the Interstate Commerce Act[3] and the proceeding here involved was commenced under the designation *Investigation & Suspension Docket No. 4718, Grain Proportionals, Ex-Barge to Official Territory.*

In due course there issued two reports, one by Division 2 (246 I. C. C. 353) and the second on

[3] See Appendix, *infra*, p. 88.

reconsideration by the entire Commission (248 I. C. C. 307). By these reports the Commission sustained the validity of the proposed tariffs. Thereupon three suits were filed (subsequently consolidated) to set aside the Commission's order. They culminated in this Court's decision upholding the order. In its decision this Court pointed out that the protestants' case both before the Commission and in the court was pitched upon the proposition that the exbarge grain traffic could not lawfully be denied the use of the rail proportional rates outbound, and the decision of the Commission did no more than to hold to the contrary upon the record before it, at the same time recognizing that in a proper proceeding it might "prescribe proportional rates on the exbarge traffic lower than the local rates or joint barge-rail rates lower than the combinations." The ultimate decision of this Court was:

> Read in the context, we think it [the Commission's finding that the proposed schedules cannot be condemned as unlawful under sections 2 and 3 of the act] meant only that the proposed schedules could not be struck down upon the erroneous view advanced by the protestants. The finding of the Commission that the proposed schedules "are not shown to be otherwise unlawful" is, we think, to be similarly read. This form of finding has been held by the Commission not to constitute an approval

or a prescription of the rates under suspension. Since the Commission refused to approve or prescribe them, they stand only as carrier made rates which, under the Commission's decisions leaves them open to possible recovery of reparations. Like the Commission, we also refrain from approving or prescribing them.

**B. The Present Proceedings**

Following this decision the Commission on July 13, 1943, reopened the original case, I. & S. 4718, for further hearing to determine whether or not proportional rates should be prescribed on this ex-barge grain traffic, and if so, to determine the measure of such proportional rates, or to determine what, if any, reasonable and otherwise lawful joint barge-rail rates should be prescribed for the transportation of grain between barge origins and the eastern rail destinations (R. 56).

Further hearing was then had at which appeared, among others, the appellees in this appeal and the interested rail carriers. A voluminous record was made following which briefs were filed. A proposed report by the trial examiner was issued. Exceptions thereto were filed and the case was orally argued before the entire Commission.

On February 13, 1945, the Commission issued its report and order which is the subject of this suit (R. 10).

The Commission, by this report and order, condemned and ordered cancelled, the proposed tariffs which would have subjected the ex-barge traffic to the use of the local rail rates. The report itself, however, considered in detail the existing rate situation and its development, the nature and volume of traffic involved and the transportation characteristics of the barge-rail movement in question as compared with the all-rail movement. It concluded that ex-barge proportionals may vary from the ex-rail and ex-lake proportionals. It thereupon approved a scale of ex-barge proportionals made differentially under the local rail rates and which resulted in all instances in through barge-rail combination rates considerably lower than the through all-rail combination rates.

The ultimate findings of the Commission are (R. 36):

> 1. We find that we should not prescribe joint rates on the barge-rail traffic above described.
>
> 2. We further find that reasonable and otherwise lawful proportional rates for the interstate transportation by rail of ex-barge grain, in carloads, from Chicago, Ill., to the eastern destinations considered herein, under sections 1, 2, 3 (1), 3 (4), 6 (11) (b), and 15a (2) of the Interstate Commerce Act, administered with a view to carrying out the national transportation policy, will be those made differentially under the local rail rates which are or may

be hereafter concurrently maintained from Chicago, as set forth below, with the customary differentials on the products and export traffic which are no less favorable to the ex-barge traffic and no more favorable to the ex-rail and ex-lake traffic than is represented by the relation between such prescribed ex-barge proportionals, on the one hand, and the present ex-rail and ex-lake proportionals or specifics, on the other.

| *When the local rail rate on grain is:* Cents | *Differential ex-barge under local rate, shall be:* Cents |
|---|---|
| 13–14 | 1 |
| 15–22 | 2 |
| 23–24 | 3 |
| 25–26 | 4 |
| 27–28 | 5 |
| 28.5 and over | 5.5 |

3. We further find that such ex-barge proportionals shall be subject to the same policing provisions as the ex-rail and ex-lake proportionals, but shall not be made subject to the fourth-section rule.

As the proposed schedules have not become effective due to the voluntary postponement by respondents of the effective date thereof, no order requiring establishment of the rates herein found lawful appears necessary at this time. An order will be entered requiring the cancellation of the proposed schedules, without prejudice to the filing of new schedules in conformity with the findings herein.

The order of the Commission of February 13, 1946, which accompanied this report merely re-

quired the cancellation of the tariffs which would have subjected the ex-grain traffic to the local rates, on or before April 5, 1946, upon not less than one day's notice (R. 49). This date was subsequently extended to June 5, 1946.[4]

### C. The Proceedings in the Court Below

Following service of the report and order of the Commission three separate proceedings were instituted in the court below to set aside that portion of the Commission's order which approved a scale of proportional rates on the ex-barge traffic differentially higher than the ex-rail and ex-lake proportionals. The complaint of Mechling Barge Line and of the Secretary of Agriculture named only the United States as defendant (R. 1, 67). The complaint of the Inland Waterways Corporation joined as defendants both the United States and the Interstate Commerce Com-

[4] Commissioner Miller dissented on the ground that the Commission should not have prescribed proportional rates on the ex-barge traffic since such traffic is not subject to the Commission's jurisdiction under the exemption of section 303 (b) (R. 37).

Commissioner Alldredge dissented on the ground that if the Western railroads were suffering from the barge competition the remedy was not to increase the revenues of the eastern carriers, and further, that the action of the majority was in violation of section 3 (4) (R. 38).

Commissioner Patterson dissented on the ground that prescribed rates perpetuate fourth-section departures and prevent the rail carriers, against their will, from eliminating them in contravention of the law (R. 40).

mission (R. 57). None of these complaints named respondent rail carriers as defendants nor did such carriers see fit to intervene in these suits.

The United States through the antitrust division of the Department of Justice filed its several answers to the complaints confessing error as alleged and joining in the prayers for relief (R. 81, 82, 83). The Interstate Commerce Commission intervened and answered to the merits denying the allegations of error and thus issue was joined (R. 75, 77, 78). These three complaints were subsequently consolidated.

In the meantime the respondent rail carriers on June 2, 1946, in compliance with the Commission's order, filed tariffs cancelling the tariffs under consideration in I. & S. 4718, and at the same time proposed to make effective on October 5, 1945, proportional rates on ex-barge grain conforming to those approved by the Commission (R. 114).

On or about October 1, 1945, the Secretary of Agriculture, one of the plaintiffs in the consolidated cause, filed his motion for an order temporarily restraining the operation and effect of the Commission's order to the extent that it approved or authorized the ex-barge proportionals above mentioned, and temporarily restraining the Commission from permitting such rates to become effective (R. 114). Hearing was had on this motion on October 4, 1946, and on the same

day the court below issued an order directed solely against the Interstate Commerce Commission temporarily restraining it from permitting to become effective any tariffs that had been or might be published in conformity with its order approving a scale of ex-barge proportional rates (R. 152).

Under compulsion of this temporary restraining order the Commission on October 4, 1945, issued an order suspending the tariffs which were to have become effective October 5, 1945, until May 5, 1946.[5]

Final hearing upon the merits of the consolidated actions was had on October 16, 1945, before a court of three judges organized pursuant to the provisions of the Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 220) (R. 156). After the entire record of the proceedings before the Commission was offered and received in evidence and without hearing the plaintiffs in the cause, the court below announced that it desired to hear from the Commission in support of the order in issue. Whereupon the Commission

[5] The Commission has no power to suspend proposed rates except in accordance with the provisions of section 15 (7), see Appendix, p. 88, *infra*. Its power to suspend proposed rates must be coupled with a hearing and investigation concerning their lawfulness, and is limited to a period of seven months regardless of whether such investigation has been completed. The power of the court below to compel the Commission to suspend the rates in issue is challenged in this appeal.

argued the validity of the order based upon the findings contained in the Commission's report and the assertion of statutory authority based thereon. At the conclusion of the Commission's presentation the court below orally announced its judgment for the plaintiffs and against the validity of the Commission's order (R. 173).

The court below did not file a written opinion in support of its judgment but on November 26, 1945, adopted over the objections of the Commission, extensive findings of fact and conclusions of law prepared and submitted by the plaintiffs (R. 177).

On January 23, 1946, the Commission within the time allowed by the statute,* filed its petition for appeal to this Court and on the same day the appeal was allowed by the court below (R. 209, 214). The necessary appeal papers were served upon the plaintiffs as appellees as required by the Rules of Court. On February 12, 1946, the United States acting through the antitrust division of the Department of Justice obtained in the court below a rule against the Commission to show cause why the United States should not be designated as a necessary party to the appeal and served with appeal papers therein (R. 220). On February 21, 1946, following hearing on the rule the court below entered an order directing the Commission to serve upon the United States

* C. 32, 38 Stat. 220; Judicial Code, sec. 20.

true copies of the order allowing the appeal, citation on appeal and all other papers required by law and amended the order allowing the appeal and the citation on appeal accordingly (R. 221).[1]

## ASSIGNED ERRORS TO BE URGED

1. The court below exceeded its authority in making independent findings of subordinate facts and weighing the evidence and reaching conclusions upon administrative matters (Assignment of Errors Nos. 3 to 6, inclusive (R. 210)).

2. The court below erred in ignoring the basis for the order complained of as disclosed by the Commission's report, and in passing upon and appraising the probative value of the evidence before the Commission thus substituting its judgment for that of the Commission (Assignment of Errors Nos. 7 to 27, inclusive (R. 211)).

3. The court below erred in holding that the Commission's report lacks findings to support the approved scale of proportional ex-barge proportional rates (Assignment of Errors No. 28 (R. 213)).

4. The court below erred in holding that in some respects the findings of the Commission are

[1] This action has been assigned as error on ground that the United States as statutory defendant cannot be converted by the authority of any statute into an appellee. See *infra*, p. 13.

not supported by substantial evidence (Assignment of Errors No. 29 (R. 213)).

5. The court below erred in holding that the Commission's report disclosed no rational basis for its approval of the scale of ex-barge proportional rates (Assignment of Errors Nos. 30 and 31 (R. 213)).

6. The court erred in holding that the Commission failed to observe the requirements of section 3 (4) and the transportation policy of the Interstate Commerce Act (Assignment of Errors Nos. 32 and 33 (R. 213)).

7. The court below exceeded its authority in its order of October 4, 1945, granting a preliminary injunction, in that it compelled the Commission to exercise its power to suspend the rates in issue in a manner contrary to the provisions of the Act conferring such power (Assignment of Errors No. 35, R. 214).

8. The court below erred in considering and passing upon the motion of the United States for a rule to show cause why it should not be made party to the appeal and served with the appeal papers, and in entering its order of February 21, 1946, upon said motion (Supplemental Assignment of Errors Nos. 1 and 2, R. 223).

## QUESTIONS PRESENTED

The order of the Commission involved in this case approves a scale of proportional railroad

rates applicable to grain arriving at Chicago via barge line and subsequently shipped to destinations in the East. The validity of the Commission action must be tested by the conventional standards of judicial review of administrative action. The primary issues are:

1. Do the proportional rates approved by the Commission offend against section 3 (4) of the Interstate Commerce Act and the national transportation policy declared therein?

2. In concluding that the transportation characteristics of the barge-rail service in question differed from the corresponding all-rail service so as to justify a different rate treatment, did the Commission apply lawful standards of comparison?

3. Do the subordinate findings of the Commission rationally support its conclusion that the existing ex-rail proportionals did not provide a proper measure for determining the level of ex-barge proportionals?

4. Do the subordinate findings of the Commission rationally support the scale of ex-barge proportionals approved?

Subordinate issues are:

1. The jurisdiction of the court below to issue its preliminary injunction requiring the Commission to exercise its suspension powers under section 15 (7).

2. The validity of the review accorded the Commission report by the court below.

3. The jurisdiction of the lower court to convert the United States, the statutory defendant, into a plaintiff-appellee.

## SUMMARY OF ARGUMENT

### I

Neither sections 2, 3 (4) of the Interstate Commerce Act, nor the national transportation policy precludes the Commission from approving proportional rail rates for the transportation of ex-barge grain from Chicago to eastern destinations higher than the contemporaneous ex-rail or ex-lake proportional rates. This was definitely and finally decided by this Court in the prior appeal in this proceeding. *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U. S. 671. The express provisions of the Interstate Commerce Act support this Court's decision. Section 1 (4) authorizes the Commission to establish rail proportional rates to or from the ports differing from the corresponding local rates for the same rail transportation and which apply only to traffic which is brought to or carried from the port by a common carrier by water. Section 305 (c) provides that differences in rates of a water carrier from those in effect by a rail carrier with respect to rail transportation shall not be

deemed to constitute unjust discrimination, prejudice, or disadvantage, or an unfair or destructive competitive practice. Section 307 (d) directs the Commission in fixing joint water-rail rates to prescribe such reasonable differentials as it may find justified between all-rail rates and the joint rates in connection with the common carrier by water.

The national transportation policy does not require a preference for water transportation. It enjoins the Commission to see to a fair and impartial regulation of all modes of transportation and to recognize and preserve the inherent advantages of each.

The carrying out of the national transportation policy requires administration. The nature and extent of the inherent advantages of each mode of transportation, the manner in which they are to be preserved, especially where they are in conflict, are determinations for the expert judgment of the Commission. That this is so is especially illustrated in the instant case: Where the through transportation cannot be accomplished by water transportation alone it becomes necessary to evaluate the contribution made by each respective mode employed.

The interest of the farmer-shipper of grain lies in the price which he receives for his grain. Low cost water transportation is only one factor in determining that price. The cost of trucking

grain to the river and other necessary costs incident to river transportation are necessarily involved in measuring the inherent advantage of this barge transportation. It cannot be assumed that these costs will remain constant and that variation in the cost of the rail segment of the through transportation is to be looked to alone.

The barge-lines interest lies in obtaining as much traffic as possible. But they have no inherent right to claim as tributary to their river routes territory from which by virtue of their own rates and the present cost of trucking to the river they now draw traffic. If the Commission's order in this case operates to reduce that territory—a result which an increase in trucking costs or in the barge rates themselves would effect—that cannot *per se* condemn the order.

It therefore is clear that in determining proper charges for the through barge-rail transportation the Commission was called upon to balance the varying and sometimes conflicting interests represented in the proceeding and arrive at rates for the ex-barge traffic adjusted "in view of its particular circumstances and under the provisions of the Act designed with reference thereto."

The practicalities of the situation, likewise, deny the soundness of the lower court's position the consequence of which is to say that this ex-barge traffic must be accorded the lowest out-bound rail rate. But under the present rate structure there

are varying sets of proportionals applicable to destinations in central territory dependent upon the origin of the grain west of Chicago. Likewise transit balances on one-factor rates through Chicago are available to rail grain. To give full effect to the judgment of the lower court would wholly disrupt the rail rate structure.

By mere accident of tariff publication ex-barge grain has been and is being accorded ex-rail proportional rates which had been developed over a period of years to meet circumstances and considerations which were not present in barge-rail transportation in question. These rates were part of a complicated grain rate structure, the components of which were interrelated so as to reflect average rail transportation conditions governing the entire movement of grain from the producer through primary and secondary markets and processing points to the ultimate consumer. The rates from western origins to the gateways had been prescribed by the Commission. *Grain and Grain Products,* 205 I. C. C. 301.

Equalization as between origin and destination territories and as between the gateways had its place in the fixing of the out-bound rail proportionals from the gateways.

The Official Territory rate structure grew out of an effort to stabilize and reconcile the proportional rates out-bound from Chicago with the existing transit balances of one factor through

rates between origins and destinations within Official Territory. The result was to establish proportional rates equal to the out-bound specific of the one factor through rates whether or not the route was via Chicago. Since the in-bound rail hauls were comparatively short arbitraries were allowed to the western carriers in order for them to secure compensatory revenue which in turn was offset in the out-bound rate. Consequently these specifics as representing divisions of a joint through rate less than would have resulted if they had been constructed on a mileage basis, did not present an appropriate measure for determining the proper ex-barge proportionals.

Because the contention was made that the ex-barge traffic was entitled to proportional rates no higher than the ex-rail and ex-lake traffic bore it became necessary for the Commission to consider the history, purpose, and scheme of these ex-rail and ex-lake proportionals and their relation to the grain rate structure. This the Commission did. Its report pointed out that the underlying factors that gave rise to the particular proportional rates in relation to rate adjustment as a whole provided no pertinent standard for determining the measure of ex-barge proportionals.

Furthermore, as the Commission pointed out, the all-rail rate structure reflects a consistent grading from east to west in strict conformity with section 4 of the Interstate Commerce Act,

whereas to continue the application of the ex-rail proportionals to the ex-barge traffic would result in extreme fourth-section departures and thus perpetuate what this Court termed "the fortuitous and in many respects unlawful benefits of the existing rate structure" (319 U. S. 671, 691).

In meeting the contention that a denial of the ex-rail proportionals to the ex-barge traffic would work a violation of section 3 (4) as a forbidden discrimination against connecting carriers, the Commission found that the differentiating characteristics as between the through barge-rail transportation service and the through all-rail transportation service justified different rate treatment. In so doing the Commission did not transcend its statutory authority or act arbitrarily.

The discrimination forbidden by section 3 (4) partakes of the same quality as discrimination and undue prejudice against persons and localities. Equality of treatment under this section must be determined by similarity of circumstances and conditions. Whether or not there are differentiating circumstances which warrant different rate treatment is the exclusive administrative function of the Commission. This issue the Commission settled affirmatively by specific and categorical findings as to what those differences were as between the through all-rail service and the through barge-rail service.

The court below, however, by its own elaborate and independent findings of subordinate facts reappraised the record upon which the Commission had acted, and concluded that the Commission considered matters that had "no rational relation to the conclusion that such ex-barge reshipping rates could lawfully be those, higher than such ex-rail and ex-lake reshipping rates, prescribed by the Commission, under the rules and standards prescribed by the Interstate Commerce Act as amended in 1940." But in so finding the lower court erroneously assumed that the issue involved the determination of the lawful rates for the unrelated ex-barge traffic from Chicago to eastern destinations. It ignored considerations that motivated the Commission in according ex-barge traffic a rate treatment differing from the ex-rail traffic.

But aside from these matters it is difficult to discern a discrimination against the barge-rail movement in the proportional rates approved by the Commission, for in every instance the combined barge-rail rate from any barge origin to any eastern rail origin is less than the all-rail combinations from the same origin to the same destination.

## II

Reference to the report of the Commission demonstrates that the basic findings of the Com-

mission provide a rational basis for the scale of ex-barge grain proportionals which it approves.

III

The findings of fact and conclusions of law adopted by the court below and upon which its final judgment rests present a method of judicial review of administrative action at odds with well-established principles. In concluding that the order of the Commission is invalid that court resorted to an examination of the record. It made its own independent findings of subordinate facts, evaluating the weight and pertinency of the evidence before the Commission. It ignored or discarded or weighed the probative value of many of the findings of the Commission. Thus the court below assumed and exercised the right to review the record upon which the Commission acted and to substitute its judgment for that of the Commission upon purely administrative matters.

IV

By its preliminary injunction in this case the court below exceeded its authority in requiring the Commission to suspend the tariffs promulgating the approved scale of ex-barge proportional rates. The Commission power to suspend proposed rates derives from section 15 (7) of the Interstate Commerce Act. But this power can only be exercised as an incident to a Commission

investigation concerning the lawfulness of such rates. Here the predicate for the exercise of the given power was absent.

While the relief sought through the motion for preliminary injunction was appropriate the plaintiffs, through their failure to make the railroads proposing the rates parties to the proceeding and thus subject to process, had themselves foreclosed the court from according them injunctive relief. For the court below to attempt to cure this omission by directing the Commission to exercise a power not given it by statute and in contravention thereof was clearly error.

## V

In its order directing that the United States, the statutory defendant, be made a party plaintiff-appellee and served as such in this appeal the court below injected a new procedural requirement in perfecting appeals to this court from the judgment and decree of the specially constituted three-judge district court.

Under the Urgent Deficiencies Act the United States is the only necessary party defendant and may be solely answerable for the defense of the Commission's order. There is no statutory authority for the United States in its sovereign capacity to sue to set aside an order of its own governmental agency. To give it the rights of an appellee where an order of the Commission has

been set aside creates an anomaly, is inconsistent with the statute and imposes an additional burden upon parties seeking appellate review of such order.

## ARGUMENT

### I. In Approving the Scale of Proportional Rates for the Ex-Barge Traffic in Question the Commission Acted Within the Permissible Range of Administrative Discretion and Under Statutory Criteria

#### A. The Interstate Commerce Act Does Not Require That Proportional Rates for the Transportation of Ex-Barge Grain From Chicago to the Specified Eastern Destinations Be No Higher Than the Rates That May Be Contemporaneously Exacted for the Same Rail Service on Ex-Rail and Ex-Lake Grain

##### *(1) The Prior Decision in This Proceeding Has Set This Proposition to Rest*

Were it not for the course which this case has taken since the prior decision of this Court, *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U. S. 671, we would consider it unnecessary to reargue the premise that under sections 2 and 3 (4) and the national transportation policy the Commission is not precluded from approving proportional rates for the transportation of ex-barge grain higher than the contemporaneous ex-rail or ex-lake proportional rates. We thought, and still think, this Court's decision was clear on that point. But in the subsequent proceeding before the Commission the present appellees, while not explicitly so contending, in effect urged a repudiation of this Court's decision by contending that under the record the approved

ex-barge proportional rates should be no higher than the ex-rail or ex-lake proportionals even though it would preserve what this Court termed "the fortuitous and in many respects unlawful benefits of the existing rate structure" (p. 691).

The prior proceeding was contested upon appellees' contention that the Interstate Commerce Act itself, particularly the national transportation policy declared therein and sections 2 and 3 (4), condemned the establishing of proportional rates applicable on ex-barge traffic higher than prevailing proportional rates on the ex-rail or ex-lake traffic. On this score the Commission said in its report, *Grain Proportionals, Ex-Barge to Official Territory*, 248 I. C. C. 307, 311:

> Protestants maintain that the proposed schedules will be unreasonable, unjustly discriminatory, and unduly prejudicial against Chicago, the ex-barge traffic, shippers, elevator operators, and dealers interested in the ex-barge traffic, and the Federal Barge Lines as a connecting line, and unduly preferential in favor of other lake ports, ex-rail and ex-lake traffic and in favor of shippers, elevator operators, and dealers interested in ex-rail and ex-lake traffic and respondents' connections by rail and lake. This is based primarily on the fact that under the proposed schedules the ex-barge rates will be higher than the ex-rail or ex-lake rates, although in each instance the physical carriage beyond the

> reshipping point is substantially the same. But the latter is also true of local grain, grain brought in by truck, or by rail under intrastate rates, or grain which has forfeited its transit privileges. To adopt protestants' premise would mean that all proportional rates lower than local rates and differing from each other according to the origin of the commodity would have to be condemned. As pointed out by the division, reshipping or proportional rates are in their essence balances of through rates. Such balances are, of course, determined by the measure of the in-bound and through rates, and properly may vary according to the relative length and nature of the in-bound and through service. It follows that the protestants' allegations cannot be sustained in this proceeding, although in a proper proceeding we might prescribe proportional rates on the ex-barge traffic lower than local rates, or joint barge-rail rates lower than the combinations.

This statement was quoted and approved by this Court in its subsequent decision (pp. 681, 684). This Court then noted that the case had developed on the theory that ex-barge grain was entitled to the unrestricted use of ex-rail proportionals and the record before the Commission did not contain material from which the Commission could properly rate the barge-rail traffic. After enumerating "the fortuitous and in many

respects unlawful benefits of the existing rate structure" (p. 691), this Court said (p. 688):

> * * * Nothing in the Interstate Commerce Act as amended by the Transportation Act of 1940, or in the statements of even the most ardent champions of water transportation, affords the slightest warrant for a decision that the Commission must treat as legally identical such widely disparate factual situations.

As to the National Transportation Policy as affecting the issues the opinion stated (p. 691):

> The policy provisions of the Transportation Act of 1940, as well as the specific statutory provisions, provide only standards of considerable generality and some overlapping. It requires administration to "recognize and preserve the inherent advantages of each"—rail, water, and motor transport. It also seeks "sound economic conditions" for all kinds of transportation.

While this decision left open to the Commission to decide upon a proper record what rail rates this ex-barge traffic might lawfully engage, it did not restrict the Commission in the performance of that administrative function and clearly removed from the case any basis for the view that the similarity of the circumstances and conditions obtaining in the out-bound rail movement of all grain from Chicago precluded the Commission from considering differences found to exist

between the through barge-rail movement and the all-rail movement as a matter of statutory requirement.

***(2) The Provisions of the Act Itself Confirm This Court's Prior Decision***

The Panama Canal Act, 37 Stat. 568, in 1912, conferred jurisdiction on the Commission to determine the terms and conditions upon which physical connections are to be operated between common carriers by water and common carriers by rail, the power to establish joint routes and maximum joint rates over rail and water lines (now incorporated into section 1 (4)), and the power to establish proportional rates, or maximum or minimum or maximum and minimum proportional rates by rail to and from the ports to which the traffic is brought, or from which it is taken by the water carrier (now section 6 (11)). Proportional rates were then defined:

> By proportional rates are meant those which differ from the corresponding local rates to and from the port and which apply only to traffic which has been brought to the port or is carried from the port by a common carrier by water.

The Inland Waterways Corporation Act, 43 Stat. 360, in 1924, provided for the certificating of common carriers by water who desired to join with railroads in through routes and joint rates and empowered the Commission to compel all

connecting common carriers to join with such water carriers in through routes and joint rates and in so doing to "fix reasonable minimum differentials between all-rail rates and joint rates in connection with said water service * * *." See *Chicago, R. I. & P. Ry.* v. *United States*, 274 U. S. 29.

The effect of the Transportation Act of 1940, 54 Stat. 899, was not to curtail existing powers of the Commission over water-rail transportation. It extended the jurisdiction of the Commission over all-water interstate servic and rearranged the provisions theretofore applicable to joint water-rail service and incorporated provisions of section 3 (e) of the Inland Waterways Corporation Act into the amended Interstate Commerce Act.

The present act in section 305 (e), which is the water-carrier counterpart of section 3 (1), prohibits undue or unreasonable preference or advantage and then provides:

> Differences in the classifications, rates, fares, charges, rules, regulations, and practices of a water carrier in respect of water transportation from those in effect by a rail carrier with respect to rail transportation shall not be deemed to constitute unjust discrimination, prejudice, or disadvantage, or an unfair or destructive competitive practice, within the meaning of any provision of this Act.

Again, in section 307 (d) of the present Act, the Commission is directed, in establishing through routes and joint rates:

> In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water.

Thus the Act itself contains provisions under which the Commission may prescribe specific proportionals applicable only to a particular water traffic to and from the port, or joint water-rail rates differentially under all-rail rates, and further, that carriers may have rates applicable to all-water traffic, which may be different from the rates applicable to rail-water or all-rail transportation through the same port.

If it be kept in mind that the difference between a combination of proportionals and a joint rate is one of method of rate making not one of substance, it becomes clear that there is no forbidden discrimination *per se* in failing to require the application beyond the port of the rail proportional on water-borne traffic or, conversely, of the water rate to the rail-borne traffic.

The declaration of a national transportation policy in the Transportation Act of 1940 does not constrict the specific provisions of the Act. It seems to have been the position of the plaintiff

in these suits as well as that of the court below that this policy was especially designed for the benefit of water-borne traffic and that its interests should predominate over all other interests. But the language of the declaration does not support such an interpretation. The Commission, in administering and enforcing the provisions, is enjoined to see to a "fair and impartial regulation of *all modes of transportation* * * * so administered as to recognize and preserve the inherent advantages of *each*, to promote safe, adequate, economical and efficient service in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services without unjust discrimination, undue prejudices or advantages or unfair or destructive competitive practices * * *." [Italics supplied.] Plainly equal consideration is to be given each mode of transportation and the several kinds of carriers. The inherent advantage of each mode of transportation, whether rail, water, or motor carriage, is to be recognized and preserved. What these several inherent advantages are the Act does not say. Necessarily it is left to the Commission to ascertain and evaluate them. It may be assumed that one of the inherent advantages of water transportation is lowness of cost. *Cf. Inland Waterways Corp.* v. *Alabama, G. & S. R. Co.*, 151 I. C. C. 126, 144. But who is to measure that advantage in a given situation, and how far does

it extend and to what extent must it be preserved where it collides with an inherent advantage of another mode of transportation service? As this Court said in the prior decision in this case, 319 U. S. 671, 691:

> It requires administration to "recognize and preserve the inherent advantages of each"—rail, water, and motor transport.

That this is true is especially illustrated in the instant case. The advantage to shippers accessible to the inland waterways is the low cost of the transportation of grain to Chicago. That cost increases with the distance of the river origin from Chicago until it becomes more advantageous to ship by barge to southern markets (R. 21). Where grain is barged to Chicago does the inherent advantage of low cost transportation extend to ultimate destination which can be reached only by rail? Considering the through transportation to what extent must the lower cost of barge-rail transportation be given effect as against the advantage of all-rail transportation between the same points?

Again, the inherent advantage of low-cost barge transportation is moot unless it be translated in dollar and cents benefit to the shipper-farmer. We do not gainsay that a combination barge-rail rate lower than an all-rail rate may affect the price which the farmer receives for his grain. But it is only one of several factors which determines that price. Among those factors is the cost of

getting the grain to the river elevators. The farther the farmer is from the river the less the "inherent advantage" of barge transportation is to him. Thus as shown on Table IV of the Commission's report (R. 48) the volume of grain transported by barge to Chicago decreases as the trucking charges for delivery to the river port increase. So too the longer the river haul is with its consequent cost increase the less the volume of grain transported. Plainly the cost of trucking to the river and the cost of barge transportation play just as important parts from the standpoint of the farmer-shipper as the outbound rail costs. Yet the position of the appellees assumes that the last-named factor, despite the inability of the Commission to control the two other factors,[8] is the full measure of the inherent advantage to which the farmer-shipper is entitled.

In this aspect the situation of the barge lines is no better. The transportation policy requires the Commission to promote safe, adequate, economical, and efficient service in transportation and among the several carriers and to avoid un-

[8] The Commission found that port-to-port rates on bulk grain over the Mechling Barge Line were not subject to its jurisdiction. Sec. 303 (b) (R. 23).

As to the motor transportation involved in the movement from producer to consumer, section 203 (4) exempts from regulation motor vehicles controlled and operated by any farmer when used in the transportation of his agricultural products, or motor vehicles used in carrying agricultural commodities if not used in carrying any other property or passengers for compensation.

just discrimination, undue prejudices or advantages, or unfair or destructive competitive practices. The barge lines complain that the rates approved by the Commission will result in diversion of traffic from them to the rail lines. That there may be some diversion of traffic is not denied. But their contention assumes that they are entitled under the law to all the traffic they are now carrying and any loss of that traffic as a result of the Commission's order automatically invalidates it. In other words they claim that the present territory from which they now draw traffic—up to 77 miles from the river elevators—is inflexibly tributary to their mode of transportation. But in the nature of things that cannot be so for an increase or decrease in their own barge rates or in the cost of trucking to the river necessarily diminishes or expands the territory. It must follow that a loss of traffic resulting from the Commission's order cannot *per se* condemn it. This situation further emphasizes that the problem before the Commission was one of administration, to determine what rates for the ex-barge traffic would be fair and equitable from the standpoint of the two types of carriers involved. Compare *Scandrett* v. *United States*, 32 F. Supp. 995, affirmed 312 U. S. 661.

In the light of the express provisions of the Act the emphasis upon the National Transportation Policy loses force. As has been shown, the

inherent advantages of both the rail and water transportation in this case which must be recognized and preserved are not susceptible of precise accounting. Here the Commission is called upon to exercise its expertise upon the record developed before it. It is not for the reviewing court to usurp this function.

From the practical standpoint the position of appellees and the lower court is untenable. It would mean that the lowest available rail proportional would have to be given the ex-barge traffic. But under the present rate structure to points in Central Territory there are three varying sets of proportional ex-rail rates applicable. Even the appellees ask only that the present Northwest proportional be applied which is not the lowest basis of rail proportionals in all cases. Again, many rail shipments move out of Chicago on the basis of a transit balance of a one-factor rate. Would ex-barge grain, as a matter of law, be entitled to move out by rail at the lowest possible transit balance? To carry out the logic of such reasoning would mean the total disruption of all-rail rates and incurable chaos.

**B. In Determining the Proper Measure of Ex-Barge Proportionals the Commission did not Err in Discarding the Current Ex-Rail Proportionals as a Standard of Reasonableness**

A great deal of confusion in this case has been engendered by the fact that the advent of barge transportation projected a new and unforeseen

factor in the over-all grain rate structure. By mere accident of tariff language proportional rail rates have been applied to this ex-barge traffic. These rates had developed over a period of years in relation to the movement of grain by rail and were part of a complicated grain rate structure, the components of which were interrelated so as to reflect average transportation conditions governing the entire movement of grain from the producing fields to points of ultimate consumption. Grain rates are constructed on a combination basis from western origins to Official Territory. The through charges are composed of rates from producing origins in the west to western market points plus intermarket rates between these markets and the gateway points and then the proportional rates from the gateways to destinations in Official Territory. The rates from the western points of origin to the gateways were prescribed by the Commission in *Grain and Grain Products,* 205 I. C. C. 301. In approving the construction of rate-break combinations the Commission had in mind the reasonableness of the through rates from producing origins to final destinations. It said (p. 328):

> The rate-break combinations on the Missouri River markets from Kansas, Nebraska, and other western States to Chicago and St. Louis were the result of first checking in reasonable through rates from

the origin key points to the final markets, over the direct routes through the Missouri River markets, and then breaking them back into inbound local rates to the latter markets and proportional rates beyond, on the basis of average relative mileages, resulting in proportional rates approximating the average transit balances that would have resulted if one-factor through rates with transit, in lieu of the rate-break combinations, had been prescribed. The rate-break combinations on Minneapolis from North Dakota and other northwestern States to Chicago, over direct routes through Minneapolis, also respond to this general test.

Again (p. 343):

* * * The question here is primarily the inherent reasonableness of the rates not only to the rate-break market, but also through those markets to the final markets or other destinations. The gateway relations are only incidental to the reasonableness of the total through charge. The rule for the exclusive application of the rate-break combinations is for the express purpose of according to the shipper a rate reasonable for the through service, over reasonably direct routes, and not only does not require, but does not permit, by the use of transit, of shipments at the same rate over other routes with different rate-break combinations.

In addition to the measure of the reasonableness of the through transportation charges from producer to consumer equitable provision had to be made for equalization of the through charges in order that the sum of the combinations would be the same through all the gateways, taking into consideration marketing conditions and the customs of the trade. It was also necessary that these through charges be equalized as between origin territories and destination areas where the service was substantially the same. *Southwestern Millers League* v. *A., T. & S. F. Ry. Co.*, 225 I. C. C. 195. And finally grain movements within Official Territory had to be related and reconciled to the scheme of interterritorial rates.

With this background we come to a consideration of the particular proportional rates that have been injected into this proceeding and upon which the appellees have relied as constituting the true measure of reasonableness and lawfulness for the ex-barge traffic out of Chicago.

From Chicago to points in Central Territory the applicable ex-rail proportional rates vary according to the origin of the grain. Grain from the Northwest takes a three-cent differential over grain from Trans-Mississippi territory. The purpose of the differential is to equalize Kansas City and the Twin Cities on shipments of grain through Chicago to Central Territory points and was prescribed by the Commission in *Southwestern*

*Millers' League* v. *A. T. & S. F. Ry Co.*, 225 I. C. C. 195; 227 I. C. C. 795. There, the Commission held that, average distances from Trans-Mississippi and Northwest territories requiring parity of treatment, a rate adjustment was not justified which would result in higher rates from one of the origin areas than from the other. Consequently the Commission prescribed varying proportionals east of the gateways which would work out an equalization.[9]

Another set of proportionals apply from Chicago to destinations in Central Territory on grain which originates in Illinois. These have been designated as Illinois proportional rates but under the wording of the tariffs do not apply from Chicago on ex-barge grain.

To destinations in Trunk Line and New England territories the proportionals are uniform regardless of origin. The evolution of this

[9] This rate relation was referred to by the Commission in its first report in this case, 246 I. C. C. 353, citing *Southwestern Millers' League* v. *A., T. & S. F. Ry. Co.*, 231 I. C. C. 130, where it was stated:

"Kansas City is what is known as trans-Mississippi River origin territory, and Minneapolis is in northwest territory. To most of the destination territory we required a parity of through rates from Minneapolis and Kansas City on traffic from beyond. This was accomplished by making the factors of the combination rates 3 cents higher, beyond Chicago and other related eastern gateways (no one factor rate being in effect), on traffic from beyond Minneapolis, than on traffic beyond Kansas City, because of in-bound rates to Chicago 3 cents less from Minneapolis than from Kansas City."

rate uniformity to Trunk Line and New England territories is set out in the Commission's report (R. 17). It grew out of a dissatisfaction resulting from the application of varying divisions or transit balances on shipments from Illinois origins as compared with the combination basis of through rates on shipments originating west of the Mississippi River.

Within Official Territory itself there is a full line of joint through one-factor rates from Illinois origins to eastern destinations, many of which apply through Chicago. The ex-Illinois proportional rates and these joint through rates combine to make the Official Territory grain-rate structure. The one-factor through rates apply through Chicago and also on east-west lines which bypass Chicago. The divisions accruing to the participating carriers are designated as inbound and outbound "specifics." Eastern Trunk Line Territory is reached from Illinois origins over east and west lines via direct routes, not passing through Chicago, and by north and south lines to Chicago in connection with rail lines east of Chicago. The demand has always been for the application of the through rates by way of Chicago even though the direct route would not pass through Chicago. *Western Grain Case*, 205 I. C. C. 301, 380, 215 I. C. C. 83, 103; *Grain Rates in C. F. A. Territory*, 28 I. C. C. 549. Consequently there is no distinction to be made in fact

between the charges for transportation from Chicago to the East accruing to the eastern carrier whether they be obtained in the form of a separately established proportional rate or as a division of the joint through rate.

But the history of the joint through rates shows that the specific or proportional rate beyond Chicago is not a true measure in fixing the eastern factor of ex-barge traffic. Because of the comparatively short hauls from Illinois origins to Chicago arbitraries were allowed the western roads in order to secure for them compensatory revenue for the initiation, carriage and termination of the traffic at Chicago. As a consequence the eastern factor represented a lesser division of the through rates than would have resulted from a rate constructed on a mileage scale and, therefore, afforded no proper basis for comparison.

As was pointed out in *Grain Rates in C. F. A. Territory, supra,* the application of these through rates via Chicago is the result of competition between the north and south railroad lines and the direct east and west lines, so that the rate level beyond Chicago on grain from Illinois origins to eastern destinations is actually a transit balance arising out of competitive rates via circuitous routes.

A division of a joint rate is not a proper standard by which to test the lawfulness of separately

established rates. *Merchants Exchange* v. *Mo. P. R. Co.*, 248 I. C. C. 683, 688; *Ashland, C. & I. Co.* v. *A. C. L.*, 241 I. C. C. 120, 132; *Board of Trade* v. *A. C. R. R. Co.*, 20 I. C. C. 504, 508. In the case last cited the rail charge from Buffalo to Boston on ex-lake grain was 12.5 cents. At the same time the rail rate from Chicago to Boston, via Buffalo, was 18 cents out of which the carrier out of Buffalo received a division of 7.9 cents of the through rate. It was contended that the rail line from Buffalo to Chicago in handling its portion of the through-rail movement for 7.9 cents, while exacting a rate of 12.5 cents for the same movement on ex-lake grain, was unjustly discriminatory against lake grain and Chicago. The Commission stated (pp. 508, 509):

> This Commission has uniformly held that the division of a through rate was not a matter of concern to the public, and that while it might be looked to for certain purposes it should not ordinarily be made the standard of reasonableness or the measure of discrimination. The total rate is the thing of consequence, not the manner in which that charge may be shared among the different parties to it; and this could hardly be better illustrated than by the present instance. If lines west of Buffalo were to make the entire shrinkage, allowing to lines east of Buffalo divisions equivalent to the local from Buffalo, this ground of complaint would be removed, but the complain-

ant would be in no respect benefited. The true inquiry is whether, upon the whole, there has been an unjust discrimination, and we are hardly prepared to find that such a discrimination does of necessity arise out of the fact that these all-rail carriers insist upon meeting the lake-and-rail rate.

The Commission's report points out that these joint through rates apply whether the traffic moves in continuous through transportation or is stopped at the gateway or other intermediate point for marketing or processing (R. 18).

On grain arriving at Chicago by lake the ex-rail proportionals apply outbound, the Northwest proportionals to Central Territory destinations, and to Trunk Line and New England Territories the uniform proportionals or specifics.

The scale of local or flat rates out of Chicago are applicable to local grain, grain that arrives by truck at Chicago, grain moving into Chicago on the lake local (intrastate) rates, or grain that has forfeited its transit privilege thus taking on the character of local grain. These are the rates which the Commission used in determining the differentials which should be applied to the ex-barge grain moving out of Chicago.

In undertaking the task of prescribing a scale of out-bound proportional rates, the Commission could not close its eyes to a rate structure developed over a period of many years under its own

guidance. And this was especially required because of the contention that the ex-barge traffic was entitled to proportional rates no higher than the ex-rail and ex-lake traffic bear. Since this contention was based upon the assertion that there is no material difference in the circumstances and conditions affecting the outbound and through rates on the barge-rail, lake-rail and all-rail traffic, it became necessary to examine these proffered standards of reasonableness and lawfulness. This the Commission did by reviewing the history, purpose and scheme of the particular rail proportionals and their relation to the grain rate structure as a whole. The report considers in some detail the rail rate adjustment. It points out the basis upon which the present rail proportionals were established. It shows that these proportionals evolved out of a mutual desire to eliminate varying transit balances were simply representative of divisions of through rates via Chicago brought about by competition between short route and circuitous route carriers, and that such proportionals or specifics did not, *per se*, establish a reasonable standard for rating the eastbound ex-barge rail service. Insofar as the varying rail proportionals to Central Territory were concerned they too furnished no proper measure for determining ex-barge proportionals to the same destinations since they were designed in reference to a single segment of a through rail

transportation service and to provide an equalization in the over-all charges as between the gateways.

It is submitted that the theory upon which these rail proportionals were designed and established itself justified the Commission in discarding them as appropriate standards for the ex-barge traffic.

But the impropriety for the use of the existing rail proportionals was demonstrated in another respect by the Commission. In connection with the ex-rail proportionals the fourth-section rule applies as follows (R. 18):

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[10] Section 4 (1):

"It shall be unlawful for any common carrier subject to this part or part III to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this part or part III, but this shall not be construed as authorizing any common carrier within the terms of this part or part III to charge or receive as great compensation for a shorter as for a longer distance: *Provided*, * * *."

(Here follows provision for relief from the operation of the above in special cases.)

The Transportation Act of 1940 amended section 4 (1) of the Interstate Commerce Act to read as above quoted. Paragraph (b) of section 6, while not in terms an amendment of section 4 (1) of the Interstate Commerce Act, provided:

"(b) In case of a carrier heretofore subject to the provisions of paragraph (1) of section 4 of the Interstate Com-

> In no case shall the combination through rate to and from the reshipping point be less than the local rate from the reshipping point to destination, the difference necessary to protect the local rate from the reshipping point to be added to the reshipping rate therefrom.

The result of this rule is to limit the application of the out-bound proportional rate to traffic on which a minimum inbound rail rate of 8.5 cents was paid. The Commission shows that the all-rail structure reflects a consistent grading of the rates from east to west in strict conformity with

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merce Act, as amended, no rate, fare, or charge lawfully in effect at the time of the enactment of this Act shall be required to be changed by reason of the amendments made to such paragraph by subsection (a) of this section. In the case of a carrier not heretofore subject to the provisions of such paragraph, no rate, fare, or charge lawfully in effect at the time of the enactment of this Act shall be required to be changed, by reason of the provisions of such paragraph, as amended by subsection (a) of this section, prior to six months after the enactment of this Act, or in case application for the continuance of any such existing rate, fare, or charge is filed with the Interstate Commerce Commission within such six months period until the Commission has acted upon such application." (54 Stat. 904, 49 U. S. C. 49, sec. 4, note.)

As to these provisions the Commission in its report stated (R. —):

"Under section 6 (b) of the Transportation Act, 1940, respondents [rail carriers] are not required to increase their present ex-barge proportionals to bring the barge-rail combinations in harmony with fourth-section principles."

section 4, with the exception of some departures caused by the differing levels of the proportional rates to Central Territory (R. 18).

Barge proportionals equivalent to the rail proportionals would lack the purpose and consistency underlying the latter. The factors which entered into the establishing of the through all-rail combinations do not find their counterpart in fixing ex-barge proportionals. Of special importance is the fourth-section rule mentioned above. Under the existing combinations of the inbound barge charge plus the rail proportionals to Central Territory numerous and extreme fourth-section departures exist. The Commission in its prior report in this case described them as follows (246 I. C. C. 353, 374):

> For example, such combinations [barge-rail proportionals] result in lower through charges to the Atlantic seaboard than the local rates to the same destinations from intermediate origin points on: (1) domestic grain from all points in Central Territory (Chicago and east) west of a line drawn from Bay City, Mich., through Jackson and Sturgis, Mich., and Kendallville, Fort Wayne, Marion, Westville, Indianapolis, Greenburg, Ind., to Aurora, Ind.; (2) export grain from all points in Central Territory (Chicago and east) west of a line drawn from Atkins, Mich., through Oxford, Ann Arbor, Hanover, and Pittsford Junction, Mich., and thence along the Ohio-

Indiana State line to the Ohio River; and (3) export traffic of barley, corn, oats, rye, and wheat from all points in Central Territory (Chicago and east) west of a line drawn from Painesville through Lordstown to East Liverpool, Ohio.

To perpetuate this situation would be to legalize for the ex-barge traffic what this Court termed "the fortuitous and in many respects unlawful benefits of the existing rate structure" (319 U. S. 671, 691).

**C. In Finding That the Differentiating Characteristics as Between the Barge-Rail Transportation Service and the All-Rail Transportation Service Justified a Different Rate Treatment, the Commission Did Not Transcend Its Statutory Authority or Act Arbitrarily**

The ultimate position of the appellee barge lines and of the court below is that a denial of the ex-rail proportionals to this barge traffic works a violation of section 3 (4) as a forbidden discrimination against connecting carriers.[11] The discrimination thus forbidden partakes of the same quality as discrimination and undue prejudice against

[11] This provision operates only in favor of connecting carriers subject to part I or part III. It was earnestly contended by the western rail carriers before the Interstate Commerce Commission that the barge-transportation in question was intrastate commerce and therefore beyond the Commission's jurisdiction under section 303 (j), and further, as to Mechling Barge Line, their transportation fell within the exception of section 303 (b) so as to take it beyond the Commission's jurisdiction. As to the latter the Commission held that it was without jurisdiction (R. 23).

persons and localities. *Pennsylvania Co.* v. *United States*, 236 U. S. 351, 361. Equality of treatment under this section must be determined by similarity of circumstances and conditions. *Quanah, A. & P. Ry. Co.* v. *Atchison, T. & S. F. Ry. Co.*, 211 I. C. C. 289, 291; *Atlantic Coast Line R. Co.* v. *Cape Fears Rys., Inc.*, 218 I. C. C. 152, 157; *Seatrain Lines, Inc.* v. *Akron, C. & Y. Ry. Co.*, 226 I. C. C. 7, 20; cf. *Kentucky & I. Bridge Co.* v. *Louisville & N. R. Co.*, 37 F. 567, appeal dismissed, 149 U. S. 777.

Under the issues presented to it in this case the Commission was called upon to perform the purely administrative function of determining independently whether the barge-rail service and the all-rail service presented such differentiating characteristics as to justify different rate treatment. *Nashville Ry.* v. *Tennessee*, 262 U. S. 318, 322; *United States* v. *Trucking Co.*, 310 U. S. 344, 352, 353; *Board of Trade of Kansas City* v. *United States*, 314 U. S. 534; *Northern Pacific Ry. Co.* v. *United States*, 316 U. S. 346. Comparing these two services, the Commission concluded that such differences did exist.

But even so it is difficult to find a discrimination against the barge-rail service as a whole. The ex-barge proportionals approved by the Commission result in barge-rail combinations averaging about 5 cents less than the corresponding all-rail rates to trunk-line and New England terri-

tories and to central territory barge-rail combinations averaging 6.5 cents less than the all-rail combinations (R. 35). Table V of the appendix to the Commission's report (R. 46) shows the average barge-rail combinations approved compared with the present and proposed combinations. Translating this result in terms of a specific movement: the barge-rail combination from Morris, Ill., to New York is 31 cents, made up of the 2-cent barge rate and the ex-barge proportional rate of 29 cents, whereas the all-rail combination between the same points is 35.5 cents made up of an inbound rail rate of 9.5 cents and the outbound proportional of 26 cents. There is thus a 4.5-cent differential in favor of the barge-rail movement. Even though we add to the barge-rail combination the trimming charge of 0.7 cent the rate advantage still lies with the barge-rail shipper. Under this view the lower court's finding that ex-barge and ex-rail grain coming from an identical origin west of Chicago will always take a different reshipping rate from Chicago (R. 185) is devoid of significance, and illustrates the fundamental error of the court in viewing the outbound movement as a single, independent, and unrelated shipment.

Throughout its report the Commission was careful to stress the fact that it was treating of a through barge-rail transportation service and that its one concern was to establish a reasonable and

non-discriminatory charge for that service. Its task was the same as if it had been called upon to prescribe joint barge-rail rates under the provisions of section 307 (d). In fact, its order reopening the proceeding contemplated that alternative (R. 56). That it did not do so was due to the desire of all the parties that the method of arriving at the lawful charges for the through transportation service should conform to the same scheme of rate-making that governed the rail movement of grain (R. 14). No attack had been made on the inbound barge rates and in the face of a showing that the existing barge rates were compensatory, the Commission properly accepted such rates as established components of the through transportation charges to be determined (R. 23).

Again pointing out what this Court in its prior decision had confirmed, namely, that the disparate circumstances and conditions surrounding the all-rail and lake-rail transportation as contrasted with barge-rail transportation would under proper circumstances justify differences in rates, the Commission categorically summarized what those differentiating circumstances and conditions were, thus (R. 31):

> Where, as here, ex-rail and ex-lake proportionals or specifics reflect average circumstances and conditions surrounding the all-rail and lake-rail transportation which

differ from those affecting the barge-rail transportation, we conclude that ex-barge proportionals may properly vary from the ex-rail and ex-lake proportionals or specifics to the extent warranted by such differences.

The principal differences as shown by this record and described above may be summarized as follows:

1. On the average, as compared with the ex-barge grain, the movement under the ex-rail proportionals and specifics requires less terminal service at the gateway or junction, less transit service at intermediate points in official territory, and less line-haul service to the southern portion of central territory.

2. The inbound rail hauls of all traffic which engages the ex-rail proportionals are substantially longer, on the average, than the inbound barge hauls.

3. The rate-making circumstances characteristic of the all-rail traffic, but not of the barge-rail traffic here considered, include:

(a) The ex-rail proportionals or specifics, as parts of the through all-rail rates, provide to each destination on all-rail traffic from west of the gateways an average outbound factor which is a component part of many through rates of different amounts which vary with the length of the inbound hauls and the western factors applicable thereto.

(b) The ex-rail proportionals or specifics (1) are made subject to a fourth-section rule which in effect provides that to trunk-line and New England territories they shall apply only where the inbound rate is 8.5 cents or higher, and (2) to all official territory destinations are adjusted to equalize the all-rail rates by the various routes and gateways.

(c) The ex-rail proportionals or specifics, combined with the inbound interestate rates or specifics, result in through all-rail rates to official territory which harmonize with each other and with the local rates in that territory.

4. Lake grain from the Northwest consists chiefly of wheat which has a relatively long water haul inbound and is usually preceded by an inbound rail haul. The rail-lake-rail combinations, in general, conform to the principles which underlie section 4. In these respects lake grain is like barge grain from Kansas City but unlike barge grain from Illinois. To trunk-line and New England territories, the lake-rail grain differs from all of the barge-rail grain moving through Chicago in that the lake-rail grain can and generally does by-pass that gateway entirely.

The court below, echoing the arguments of appellees, enters into an elaborate discussion dressed in the form of findings to show that the differing circumstances and conditions do not justify the

rate treatment which the Commission accorded this barge traffic. Its conclusion is generalized in Finding No. 37 (R. 204), to the effect that the Commission considered matters that have "no rational relation to the conclusion that such ex-barge reshipping rates could lawfully be those, higher than such ex-rail and ex-lake reshipping rates, prescribed by the Commission, under the rules and standards prescribed by the Interstate Commerce Act as amended in 1940.

A reading of the argument (Findings 27 to 36, incl., R. 195) demonstrates its fatuity. The principal infirmity lies in its assumption that the issue involved the determination of the lawful rates for the unrelated movement of the ex-barge traffic from Chicago to the eastern destinations and that a scale of rates based on average conditions must necessarily fall if it be shown that minor inconsistencies may develop when the approved rates are applied to some specific movements. Failure to attain universal equitableness and harmony within a comprehensive grain rate structure is insufficient to condemn it, even assuming the accuracy of the lower court's counter-findings and its competency to make them. As this Court said in *Board of Trade of Kansas City* v. *United States*, 314 U. S. 534, 546–548:

> The process of rate making is essentially empiric. The stuff of the process is fluid and changing—the resultant of factors that

must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems. Cf. *Railroad Commission* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573, 581–582.

The wisdom of the narrow scope within which Congress has confined judicial participation in the rate-making process is strikingly vindicated by this history of this controversy. * * * There was no ready answer either in law reports or in economic experience. Any solution had to rest on informed judgment. And judgment in a situation like this implies, ultimately, prophecy based on the facts in the record as illumined by the seasoned wisdom of the expert body. In this perspective, the Commission had several choices before it—but all inevitably rested upon trial and error. * * * Of only one thing could the Commission be completely certain: no action could be taken without "adversely affecting certain of the conflicting interests." 164 I. C. C. 619, 698. * * * That the Commission itself was of a divided mind in the successive stages of this controversy emphasizes that the problem is enmeshed in difficult judgments of economic transportation policy. Neither rule of thumb, nor formula, nor general principles provide a ready answer. We certainly have

> neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission. It is not for us to tinker with so sensitive an organism as the grain-rate structure, only a minor phase of which is caught in the record before us. If we were to grant the relief sought by the appellants, we would be restoring evils which the exclusive rate-break adjustment was designed to remove—evils which, for all we know, would be far more serious than those complained of by the appellants.

Here the court below endeavors to show that the Commission's subordinate findings of differentiating circumstances and conditions do not rationally sustain the ultimate finding that ex-barge proportionals may properly vary from the ex-rail and ex-lake proportionals or specifics. It makes a series of so-called findings which purport to show the irrationality of the Commission's conclusion. In so doing it adopts some of the Commission's findings and ignores others. Thus it makes a finding that the same transportation differences exist between ex-barge and ex-lake grain on the one hand and ex-rail grain on the other based upon the Commission's statement that ex-lake grain never moves in continuous through transportation (R. 197). But this ignores the Commission's finding that lake grain from the Northwest consists chiefly of wheat which has a relatively long water haul inbound

and is usually preceded by an inbound rail-haul and that the rail-lake combinations, in general, conform to the principles which underlie section 4; that lake-grain to trunk line and New England territories can and generally does by-pass the gateway (R. 32).

Again the lower court's finding that the present ex-rail rates are not contingent upon the amount of terminal or transit service such ex-rail grain receives (R. 197), gives no effect to the Commission's full discussion of the history and development of those rates and their inappropriateness in measuring the level of rates to be accorded the ex-barge traffic.

The lower court assumes facts not appearing in the record as a basis for a finding of the Commission's inconsistency in its application of rate-making principles to arrive at the approved ex-barge proportionals (R. 194). Whether or not mere inconsistency is sufficient to condemn the order—Cf. *Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 663—the conclusion the lower court reaches ignores the evolution of the Official Territory grain rate structure and the factors which entered into the present level of rates for movements therein (*supra*, p. 40).

Categorically to reply to all the detailed findings, criticisms, and argument employed by the court below to sustain its judgment would unduly prolong this brief. We submit that a careful

study of the Commission's report demonstrates their fallacy.

**II. The Report of the Commission Rationally Supports the Approved Scale of Ex-Barge Proportional Rates**

In reaching its conclusions the Commission's report first considers in detail the rate history and the several current rate adjustments which apply on all-rail traffic, lake-rail traffic and barge-rail traffic.

As to the all-rail adjustment the report finds (R. 21):

> The all-rail adjustment by providing proportionals or outbound balances from the gateways, fixed so far as practicable at a uniform figure regardless of origin, gives the merchants and processors at such points the benefits of transit and at the same time assists them in maintaining a common price, thus facilitating hedging and other market operations. The all-rail traffic consists of all kinds of grain and grain products moving for all distances, long and short, over both direct and circuitous routes, in both continuous through transportation and where stopped in transit at the gateways or other intermediate points. It moves in box-cars with an average loading of about 50 tons on grain and a somewhat lighter loading on grain products. The present proportionals can be and are maintained in connection with the all-rail traffic and at the same time farmers and all others con-

cerned accorded local and through rates for rail transportation aligned with each other.

As to the lake-rail adjustment the report finds (R. 22):

> Unlike the all-rail traffic, the lake-rail traffic following the water courses moves only over circuitous routes, requires transfer of lading, and requires a full origin terminal service when it leaves the interchange port. In other words, it never moves in continuous through transportation. The inland lake movement consists chiefly of wheat moving for relatively long distances. The rail-lake-rail combinations are in substantial conformity with fourth-section principles.

As to the barge-rail adjustment the report finds:

> * * * The Federal Barge Line serving Kansas City and the Mechling Barge Line serving the Illinois origins are common carriers and their port-to-port rates are on file with us. Such rates are subject to our jurisdiction except those of Mechling in instances where not more than three kinds of grain are transported in a given tow. * * *[12] (R. 23).
>
> * * * The barge-rail combinations are not made subject to the above-quoted

[12] Section 303 (b) of the Interstate Commerce Act provides: "Nothing in this part [Part III] shall apply to the transportation by a water carrier of commodities in bulk when the cargo space of the vessel in which such commodities are transported is being used for the carrying of not more than three such commodities."

fourth-section rule and from Illinois are generally far below the local rates from Chicago and also lower than the local rates from numerous intermediate origins in central territory, constituting numerous and extreme departures from the long-and-short-haul provisions of section 4 of the Interstate Commerce Act. * * * This is an inequitable situation giving rise to requests for reductions in the all-rail rates from the Illinois and central territory origins and it is difficult to see, with such extreme disparities, how such requests could properly be denied. * * * (R. 24.)

The barge movement from Illinois origins consists chiefly of corn moving for relatively short distances. The barge movement from Kansas City consists chiefly of wheat moving for relatively long distances, but very little has moved to Chicago during recent years on account of scarcity of barges and channel difficulties.

* * * It is true that from origins in northwestern Illinois (north and west of the Chicago-Peoria-Fort Madison, Iowa, line), the all-rail grain moves to northern central and trunk-line and New England territories principally via Chicago or Chicago junctions, which may be said to be reasonably direct hauls. But from the many Illinois origins south and east of that line, the direct routes are not via Chicago. In this connection, it should be noted that, on grain from these and central-territory

origins over their direct single-line routes, respondents [rail carriers] obtain the entire amount of the through rates or of local rates which harmonize therewith. Whether the direct route be single or joint, the line-haul service which they perform beyond the Chicago junctions on traffic to the southern portion of central territory is substantially less than the service they perform out of Chicago (R. 24–25).

* * * Barge grain is marketed but not processed at Chicago. It follows that respondents [rail carriers] are called upon to perform more transit, on the average, on the ex-barge than on the ex-rail traffic (R. 26).

The report condemns the proposed tariffs which would have subjected the ex-barge grain traffic to the local rates to eastern destinations. It finds:

* * * To trunk line and New England territories, the ex-lake rates from Buffalo, averaging 17.7 cents or 16.5 percent of first class, apply not only on lake traffic from the Northwest but also on barge-lake traffic moving via Chicago. The proposed schedules would make no change in the rates from Buffalo but would increase the ex-barge rates from Chicago to an average of 32.5 cents or 21.4 percent of first class. This would create an unjustified disparity which will be avoided by the proportionals herein prescribed on the ex-barge traffic

from Chicago averaging 27 cents or about 17 percent of first class (R. 22).

Under the proposed schedules, the barge-rail combination on grain from Kansas City to the East, processed into flour at Cleveland, would average 42.5 cents, composed of the 9.5-cent barge rate to Chicago, plus the average local rate beyond of 33 cents on grain products, while the barge-rail combination on flour milled at Kansas City would continue at an average of 35.5 cents, composed of the 11-cent barge rate on grain products to Chicago, plus the 24.5-cent rate on the products beyond. This creates an unjustified disparity which will likewise be avoided by the proportional rates prescribed herein resulting in barge-rail combinations on this Cleveland and Kansas City traffic averaging 37 and 38.5 cents, respectively (R. 28).

* * * In any event, under the proposed schedules, the barge-rail traffic via Chicago would not have a fair opportunity to move in competition with the all-rail and lake-rail traffic (R. 29).

In that portion of the report which carries the heading "General Discussion and Conclusions" (R. 28) the Commission meets the various contentions made by the parties to the proceeding, and in particular the contention, which is the substantial basis of this court action, namely, that the ex-barge traffic is entitled to proportionals no higher than the ex-rail and ex-lake proportionals

or specifics. It concludes that the transportation differences as between the all-rail and barge-rail transportation justifies a different rate treatment of the latter (R. 31).

In determining a proper level of proportional rates the Commission set out the guiding principle which should govern its ultimate determination. This was fundamentally the effect on the movement of the traffic not only from the standpoint of the barge lines should the present ex-barge proportionals be increased, but on the rail lines should the existing ex-barge proportionals be perpetuated, all in the light of the national transportation policy as affecting the various competing relationships (R. 33). It found that the present barge-rail combinations being so much lower than the all-rail combinations from the same and other origins have diverted and will continue to divert a substantial portion of the traffic to the barge-rail routes via Chicago from the all-rail routes, including those through Indianapolis and other markets (R. 33). On the other hand the Commission finds that if the rates on ex-barge traffic are adjusted "in view of its particular circumstances and under the provisions of the Act designed with reference thereto",[19] the barge-rail traffic will have a fair opportunity to move in competition with the lake-rail and all-rail traf-

[19] 319 U. S. 671, 691.

fic (R. 33) [11] since the combination barge-rail rates under the approved scale are in all instances less than the combination all-rail rates.

In determining what should be the proper level of the ex-barge proportional rates the Commission first considered the formulae theretofore applied by it in prescribing joint barge rail rates (R. 34). It demonstrates in the present instance that the methods used in determining joint barge-rail rates would not meet the situation and finally concludes that the ex-barge traffic should be accorded uniform proportionals reflecting average conditions surrounding barge-rail transportation, to promote its movement by meeting so far as practical the commercial needs thereof, just as the ex-rail traffic, for similar reasons, has been accorded uniform proportionals reflecting average conditions surrounding the all-rail transportation. The Commission then reverts to the prescribed western trunk line scale as a yardstick for averaging the balances to trunk line and New England territories and then grading back the proportionals so arrived at through central territory (R. 35). The appropriate formula for arriving at the rates approved is set out as follows (R. 35):

> The ex-barge traffic cannot be averaged with the ex-rail transportation and accorded

[11] Only 25 percent of ex-barge corn received at Chicago during the period June 1, 1937, to December 31, 1941, moved outbound by rail (R. Exhibit 189, p. 33).

the same out-bound proportionals if, as the Act requires, the inherent advantage of each form of transportation is to be preserved, for to do so would not only give full effect to the lower in-bound cost but, in addition, would extend to the barge-rail transportation most of the advantages of all-rail transportation. However, all of the ex-barge traffic can and should be accorded uniform proportionals reflecting average conditions surrounding barge-rail transportation, to promote its movement by meeting so far as practicable the commercial needs thereof, just as the ex-rail traffic, for similar reasons, has been accorded uniform proportionals reflecting average conditions surrounding the all-rail transportation. Protestant-petitioners ask that on the ex-barge traffic to trunk-line and New England territories we prescribe uniform proportionals regardless of origin. Under all the circumstances, such uniform ex-barge proportionals may be arrived at by averaging balances to those territories under the w. t. l. scale[15] from the respective barge origins, namely, 28.5 cents ex-Illinois, 26 cents ex-Kansas City considered alone, and 25 cents ex-Kansas City considering the prior rail hauls. We thus arrive at proportionals averaging 27 cents, and made uniformly 5.5 cents under the local rates and 3 cents higher than the ex-rail and ex-

[15] *Grain and Grain Products*, 164 I. C. C. 619, 822.

lake proportionals or specifics. To trunk-line and New England territories the resulting barge-rail combinations will average about 5 cents less than the corresponding all-rail rates. Grading such proportionals back through central territory so as to fit the barge-rail traffic via Chicago and at the same time avoid any new fourth-section departures, we arrive at ex-barge proportionals to that territory averaging about 17 cents and ranging about from 1 to 5 cents, and averaging 2.4 cents, under the local rates. To that territory the resulting barge-rail combinations will average about 6.5 cents less than the all-rail combinations.

The results thus achieved are shown in Tables IV and V of the Commission's report (R. 45, 46).

Finally the report shows that the ratio and the spread or differential, barge-rail under all-rail, resulting from the basis prescribed, are considerably greater than those resulting from the joint barge-rail rates prescribed in other cases, and fully reflect the contribution of this barge grain to the transportation economy as shown by the present record (R. 36).

We submit there is nothing in this administrative treatment that oversteps the limits of the Commission's statutory authority or convicts it of arbitrariness.

### III. The Findings of Fact and Conclusions of Law of the Court Below Disclose a Plain Usurpation of the Exclusive Administrative Function of the Interstate Commerce Commission

In adopting the findings of fact and conclusions of law submitted by the appellees in this case the court below has given legal sanction to judicial review of administrative action which militates against well-established principles and, if permitted to stand, may serve only to confuse the fundamental issues in future cases involving the validity of the Commission's orders.[16]

This Court in its decisions running over many years has crystallized the law relating to judicial review. The pertinent inquiries open to a reviewing court may be summarized for present purposes thus: (1) Was the order within the Commission's statutory authority; (2) Was the order supported by adequate findings; (3) Were such findings supported by substantial evidence; (4) Were there any prejudicial procedural defects in the proceeding?

In *Virginian Railway Co.* v. *United States*, 272 U. S. 658, 663, this Court said:

> To consider the weight of the evidence before the Commission, the soundness of

[16] The findings of fact and conclusions of law adopted by the court below are at variance with its orally announced judgment at the hearing on the merits. See R. pp. 168 to 174, incl.

> the reasoning by which its conclusions were reached, or whether the findings are consistent with those made by it in other cases, is beyond our province. Whether a rate is unjustly discriminatory is a question on which the findings of the Commission, supported by substantial evidence, is conclusive, unless there is some irregularity in the proceeding or some error in the application of rules of law.

Mr. Justice Frankfurter, speaking for the Court, in *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 139–140, 145–146, distinguished between the "primary jurisdiction doctrine," requiring resort to the Commission in the first instance on matters within the peculiar competence of that body, and the doctrine of "administrative finality," said of the latter:

> Even when resort to courts can be had to review a Commission's order, the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable. *Interstate Commerce Comm'n* v. *Illinois Central R. Co.*, 215 U. S. 452, 470; *Interstate Commerce Comm'n* v. *Union Pacific R. Co.* 222 U. S. 541. * * *
>
> So long as there is a warrant in the record for the judgment of the expert body it must stand. * * * Having found that

the record permitted the Commission to draw the conclusion that it did, a court travels beyond its province to express concurrence therewith as an original question. "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Mississippi Valley Barge Line Co.* v. *United States,* 292 U. S. 282, 286–287.

Where a rate problem is involved the doctrine of administrative finality is especially appropriate since the technical complexities of such cases precludes judicial inquiry on the merits. *Board of Trade of Kansas City* v. *United States,* 314 U. S. 534, 546; *Interstate Commerce Commission* v. *Jersey City,* 322 U. S. 503, 512, 513. In the last cited case this Court said:

> * * * "the Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate order under the Act carries a heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences." *Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U. S. 591, 602. The Commission considered that it had, and we find no reason to doubt that it had, the evidence before it that was needful to the discharge of its duty to the public and to the regulated railroad. "With that sort of

> evidence before them, rate experts of acknowledged ability and fairness, and each acting independently of the other, may not have reached identically the same conclusion. We do not know whether the results would have been approximately the same. For there is no possibility of solving the question as though it were a mathematical problem to which there could only be one correct answer. Still there was in this mass of facts that out of which experts could have named a rate. The law makes the Commission's finding on such facts conclusive." *Interstate Commerce Commission* v. *Union Pacific R. Co.*, 222 U. S. 541, 550.

The instant case involves the determination by the Commission of the proper and lawful rates for the barge-rail transportation of grain. This determination has been committed to the Commission and must be kept free from judicial intrusion, as was clearly indicated in *United States* v. *Trucking Co.*, 310 U. S. 344, 352, 353:

> "It is not disputable that from the beginning the very purpose for which the Commission was created was to bring into existence a body which from its peculiar character would be most fitted to primarily decide whether from facts, disputed or undisputed, in a given case preference or discrimination existed." And where a court substituted "its judgment as to the existence of preference for that of the Com-

> mission on the ground that where there was no dispute as to the facts it had a right to do so, [the court] obviously exerted an authority not conferred upon it by the statute." So here, it has been pointed out that there was no dispute in the evidence before the Commission, all of which was introduced by respondents. But the differing inferences as to discrimination finding possible support in that evidence are made to stand out by the persuasive reasoning advanced in both the majority and minority opinions of the Commission. The Interstate Commerce Act does not attempt to define unlawful discrimination with mathematical precision. Instead, different treatment for similar transportation services is made unlawful discrimination when "undue," "unjust," "unfair," and "unreasonable." And the courts have always recognized that Congress intended to commit to the Commission the determination, by application of an informed judgment to existing facts, of the existence of forbidden preferences, advantages, and discrimination.

With these well-established principles in mind let us examine the findings of the court below upon which it predicated its adjudication of the invalidity of the Commission's order.

The lower court's approach to its decision is based upon its findings of underlying facts couched in its own language, although partially

supported by footnotes referring to the Commission's findings of similar facts. These findings (Nos. 4 to 14, incl., R. 178–182) purport to recite circumstances surrounding the physical movement of grain to and through Chicago, the volume of such movement, the hauling and storing and marketing of such grain. While it may not be that this factual recital is not supported by the record, it is equally clear that the court is picking; choosing, eliminating, weighing, and evaluating the facts for the purpose of testing the validity of the order.

Findings Nos. 15 and 16 (R. 182–185) recite the procedural history of the proceeding. In so doing the lower court refers merely to the prior decision of this Court in the case as "sustaining the Commission's order," without reference to the legal precepts enunciated which guided the Commission in its further action in the case. In these findings as well as in subsequent ones the court below characterizes the rate differentials approved by the Commission as penalty rates which characterization is unwarranted in view of the widely disparate circumstances and conditions surrounding the barge-rail, as contrasted with the all-rail, transportation, carefully and fully pointed out and discussed in the Commission's report.

Findings Nos. 17, 18, and 19 (R. 185–189), assume to predict the consequences of the Commission-approved rates. The court concludes that

the new ex-barge proportionals would "substantially decrease the volume of grain moving by barge to Chicago." In support of this factual conclusion the lower court makes detailed independent subordinate factual findings and independent deductions and prognostications based thereon as supporting argument for its ultimate conclusion.

Without further consideration *seriatim* of the lower court's findings it may be pointed out that they in effect constitute simply an effort to substitute, for the administrative findings of the Commission, independent court-made findings of the evidentiary facts and court judgment applied thereto, as for example where it attempts to refute the Commission's differentiation between barge-rail and all-rail service (see p. 52, *supra*).

Finally the lower court's practically complete usurpation of the Commission's function is confirmed by the fact that it ignored, discarded as of no weight, or weighed the probative value of many of the findings of the Commission's report. Thus it gave no effect to the Commission's finding that the ex-rail proportionals from Chicago are subject to the fourth-section rule (R. 18). It failed to give effect to the finding that under the all-rail adjustment the through rates and eastern factors thereof on grain from barge origins are substantially lower than they would be under an adjustment from all-rail origins west of Chicago

of the same average level but made on a distance scale where the outbound balances or proportionals would vary inversely with the length of the inbound and through hauls (R. 19). It gave no effect to the finding that the Illinois intrastate rates, made to meet truck and water competition, do not engage the ex-rail proportionals from Chicago (R. 20). It gave no effect to the finding that the all-rail traffic consists of all kinds of grain and grain products moving for all distances, long and short, over both direct and continuous routes, in both continuous through transportation and where stopped in transit at the gateways or other intermediate points (R. 21). It held irrelevant the Commission's findings that the rail-lake-rail combinations are in harmony with fourth-section principles, that Chicago is primarily an outbound lake port on grain (R. 32). It treated as immaterial the finding that the ex-barge proportionals are not subject to the fourth-section rule so that the barge-rail combinations from Illinois are in most instances far below the all-rail rates from Illinois origins and also far below the all-rail rates from intermediate origins in Indiana, Ohio, and western Pennsylvania, constituting numerous and extreme fourth-section departures (R. 24). It gave no weight to the Commission's findings that service under the ex-rail proportionals in connection with direct all-rail routes is less than the service under the

ex-barge proportionals from Chicago and that there is more transit service under ex-barge proportionals than under the ex-rail (R. 26). It gave no effect to the Commission's findings that in barge transportation two intermediaries are required between the farmer and the dealer at the primary market and that barge grain cannot be transported from or to rail facilities away from the river at Kansas City and Chicago without transfer of lading and extra switching (R. 27). It gave no effect to the finding that the fourth-section rule and relative service limitation, usually imposed in barge-rail cases, would in this case result in considerably higher ex-barge proportionals than those approved (R. 34).

We submit that the lower court in this case has in real effect brushed aside the Commission's report and itself assumed the right to review independently the record upon which the Commission acted and to substitute its judgment for that of the Commission.

**IV. The Court Below Exceeded Its Authority in Requiring the Commission by Its Injunction Pendente Lite To Suspend the Filed Rates**

Upon a showing of irreparable injury which would beset the plaintiffs should the approved rates become effective the court below enjoined the Commission from "permitting to become effective any tariffs or tariff supplements that have or may be published in conformity with said

order of the Commission * * *," and requiring it "forthwith to take all steps needful faithfully to observe the said restraints hereby imposed pending the hearing and determination of this cause, including the suspension of said tariff publications" (R. 154). In so doing the court below exceeded its authority.

The jurisdiction of the District Court is "to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission," either on final hearing or on application for temporary stay. Urgent Deficiencies Act, 38 Stat. 219, 220. While it is recognized that the court upon a proper showing should issue such order as will protect the rights of the complaining parties, it cannot cure a fatal defect to the relief sought by requiring the Commission to exercise a statutory power arbitrarily and contrary to its mandate. Nor would such an injunction have been necessary had the plaintiffs joined as defendants the railroads which had published the offending tariffs. Obviously it was these rail carriers against whom the injunctive process should have issued. The court below, however, closed its eyes to this situation and compelled the Commission to use its suspension power in a manner not authorized by the statute.

Under the long-established scheme of railroad regulation, carriers have been given the right to inaugurate their own rates and to change them

from time to time subject only to the formalities of printing, publishing, filing, and keeping them open to public inspection. Rates so promulgated cannot ordinarily be stricken down except after hearing and appropriate findings by the Commission. The one obstacle to a railroad filing and making effective any rate it pleases is section 15 (7) which authorizes the Commission, either upon complaint or upon its own initiative, to enter upon a hearing concerning the lawfulness of a proposed rate and, as an incident of such hearing, to suspend the operation of such rate for a period not to exceed seven months. That the power so conferred is a limited one is emphasized by the provision that it shall expire after a given period and the rate proposed shall go into effect regardless of whether or not the proceeding has been concluded.

By its interlocutory injunction the lower court in this case required the Commission to suspend the proposed rate as an independent exercise of statutory power minus the predicate which the statute demanded. That this situation was brought about by plaintiffs' failure to make these rail carriers defendants, is made clearer by the fact that the rates in question could lawfully have been made effective by them had the Commission made no finding at all with respect thereto.

**V. The Court Below Acted in Excess of Its Authority in Requiring That the United States Be Made a Party Appellee**

As has been heretofore stated, the defendant United States, in its answers filed to the complaints, confessed error and joined in the prayers for relief; and, based upon such answers, it has asserted a right to be treated as an appellee and formally to be served as such with all papers required by the Rules of Court for the perfecting of an appeal. Notwithstanding the Department of Justice was fully apprised of the appeal and copies of the appeal papers given it, it obtained a rule to show cause in the court below and an order thereon compelling the Commission formally to serve the appeal papers upon it and amending the order allowing the appeal and the citation to show the United States as a party appellee (R. 221).

The statutory warrant for the prosecution of suits to set aside orders of the Interstate Commerce Commission is the Urgent Deficiencies Act of October 22, 1913, 28 U. S. C. 41 et seq. Such suits must be brought against the United States, but the Interstate Commerce Commission and any party in interest may intervene as of right; and "the Attorney General shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervenor aforesaid, but said intervenor or intervenors may prosecute,

defend, or continue said suit or proceeding unaffected by the action or nonaction of the Attorney General" (Section 45a); and, in instances of decrees of the district courts setting aside Commission orders where the Attorney General fails or refuses to appeal therefrom, the Commission or any other party, intervening as of right, may appeal independently. *Interstate Commerce Commission* v. *Oregon-Washington R. Co.*, 288 U. S. 14.

While, in suits to set aside Commission orders, the United States has not only at times taken a neutral position but at others has similarly, as here, filed answers confessing error and asking that the orders complained of be set aside, it has not heretofore asserted that such answers so changed its status as statutory defendant as either to entitle it to be treated as a necessary appellee in instances of decrees setting aside such orders (cf. *Interstate Commerce Commission* v. *Jersey City*, 322 U. S. 503)[17] or to entitle it to itself appeal in instances of decrees sustaining the Commission's orders as valid. *McLean Trucking Co.*

[17] In this case, the United States, in filing answer, did not confess error, but announced that it was taking a neutral position. However, on the appeal by the Commission to this Court, the United States filed a memorandum urging affirmance of the district court's decree. Its right to do this is not questioned, but it is clear that such right is essentially different from the right asserted here to be treated as a necessary appellee.

*et al* v. *United States et al.*, 48 F. Supp. 933, 936, affirmed 321 U. S. 67; *American Trucking Assn. et al.* v. *United States et al.*, 56 F. Supp. 394, 400, reversed 326 U. S. 77. In both these latter cases, the United States filed answers confessing error. Also, in both cases counsel for the United States submitted argument in the district courts, both orally and in briefs, urging invalidity of the Commission's orders and, in the *McLean case*, the Secretary of Agriculture, an intervening plaintiff, joined in the appeal. But in neither case did the United States, the statutory defendant, attempt to join in the appeal to this Court from the district court decree sustaining the validity of the Commission order involved.

The Commission does not question the right of the Attorney General to express his views with respect to an order of the Commission the validity of which has been put in issue in a suit under the Urgent Deficiencies Act, either in the district court or in this Court. However, for the United States to assert, in such case as here, the right to be treated as an appellee, we submit, not only creates an additional burden upon parties seeking appellate review but stultifies the statute. The implications arising from a confirmance of this right clearly show that such position is untenable.

Under the Urgent Deficiences Act the United States is the only necessary party defendant. If no other parties in interest intervene in defense

of the Commission's order a confession of error on the part of the United States would provide ground for setting aside the order. On the other hand should the Commission or other parties intervene in defense of the order their right to be heard is uncontestable. But the mere fact that there are intervening defendants in such cases does not convert the United States from its statutory role as defendant into a plaintiff with the right to appeal from an adverse judgment. If such right exists it must be based upon statutory authority of the United States to institute a suit in its sovereign capacity to set aside a Commission order in the first instance. But no such right exists by statute which would result in the anomaly of a proceeding entitled United States v. United States.

It would also follow, should the position of the court below be sustained, that the United States might alone appeal a decree setting aside an order of the Commission. Suppose in the instant case the court below had sustained the order in question and the plaintiffs in the suit were unwilling to prosecute an appeal, would the United States alone have the right to appeal to this Court? We think not, yet the logical application of the ruling of the court below would seem to sustain such right.

Because of the probable future complications that may arise on appeals to this Court and to

stabilize the procedure the order of the lower court compelling the United States to be made a party appellee should be held in error.

## CONCLUSION

The complexities which have been introduced into this case have been occasioned by the successful efforts on the part of appellees to obtain a new hearing before the lower court upon the administrative merits involved in determining the proper and lawful level of rates for the ex-barge grain traffic. Testing the validity of the Commission action by conventional standards of judicial review a great deal of confusion and misdirection is avoided.

The Commission was called upon to fix rates for this ex-barge traffic. This Court had already decided that the Interstate Commerce Act did not preclude the fixing of such rates at a different level from those applicable to the ex-rail traffic, providing the circumstances and conditions surrounding the latter justified different treatment. The Commission found such differences existed. It, thereupon, proceeded to determine what level of rates for the ex-barge traffic would be fair and equitable to all concerned, having in mind the conflicting interests of the competing carriers, the interests of producers having access to the water routes and those not having such access, the relationship of the rates to the whole

transportation economy which represented the broad public interest involved. It performed this task in the maner it deemed best upon the record before it. It issued its report containing its basic findings and conclusions setting out the rationale of its action. The record supports its findings. We respectfully submit, therefore, that the judgment of the court below be reversed and the several complaints dismissed.

DANIEL W. KNOWLTON,
*Chief Counsel.*

DANIEL H. KUNKEL,
*Attorney.*

# APPENDIX

## INTERSTATE COMMERCE ACT, 49 U. S. C.

### NATIONAL TRANSPORTATION POLICY

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue prefcrences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

SEC. 1 (4). It shall be the duty of every common carrier subject to this part to provide and

furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

SEC. 1 (5) (a). All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

SEC. 2. That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered in the transportation of passengers or property, subject to the provisions of this part,

than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carriers shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

SEC. 3 (1). It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

SEC. 3 (4). All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates,

fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III.

SEC. 6 (11) (a). To establish physical connection between the lines of the rail carrier and the dock at which interchange of passengers or property is to be made by directing the rail carrier to make suitable connection between its line and a track or tracks which have been constructed from the dock to the limits of the railroad right of way, or by directing either or both the rail and water carrier, individually or in connection with one another, to construct and connect with the lines of the rail carrier a track or tracks to the dock. The Commission shall have full authority to determine and prescribe the terms and conditions upon which these connecting tracks shall be operated, and it may, either in the construction or the operation of such tracks, determine what sum shall be paid to or by either carrier: *Provided*, That construction required by the Commission under the provisions of this paragraph shall be subject to the same restrictions as to findings of public convenience and necessity and other matters as is construction required under section 1 of this part.

(b) To establish proportional rates, or maximum, or minimum or maximum and minimum proportional rates, by rail to and from the ports to which the traffic is brought, or from which it is

taken by the water carriers and to determine to what traffic and in connection with what vessels and upon what terms and conditions such rates shall apply. By proportional rates are meant those which differ from the corresponding local rates to and from the port and which apply only to traffic which has been brought to the port or is carried from the port by a common carrier by water.

SEC. 15 (7). Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, clasification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or

practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interstate carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

PART III, SEC. 303 (b). Nothing in this part shall apply to the transportation by a water carrier of commodities in bulk when the cargo space

of the vessel in which such commodities are transported is being used for the carrying of not more than three such commodities. This subsection shall apply only in the case of commodities in bulk which are (in accordance with the existing custom of the trade in the handling and transportation of such commodities as of June 1, 1939) loaded and carried without wrappers or containers and received and delivered by the carrier without transportation mark or count. For the purposes of this subsection two or more vessels while navigated as a unit shall be considered to be a single vessel. This subsection shall not apply to transportation subject, at the time this part takes effect, to the provisions of the Intercoastal Shipping Act, 1933, as amended.

PART III, SEC. 305 (c). It shall be unlawful for any common carrier by water to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, port district, gateway, transit point, locality, region, district, territory, or description of traffic in any respect whatsoever; or to subject any particular person, port, port district, gateway, transit point, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided*, That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description. Differences in the classifications, rate, fares, charges, rules, regulations, and practices of a water carrier in respect of water transportation

from those in effect by a rail carrier with respect to rail transportation shall not be deemed to constitute unjust discrimination, prejudice, or disadvantage, or an unfair or destructive competitive practice, within the meaning of any provision of this Act.

(d) All common carriers by water shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this subsection the term "connecting line" means the connecting line of any common carrier by water or any common carrier subject to part I.

SEC. 307 (d). The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by common carriers by water, or by such carriers and carriers by railroad, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. In the case of a through route, where

one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and common carriers by water. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancellation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of section 15.

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